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and SWIDENT, LLC, a California Limited Liability Company

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

NACIO SYSTEMS, INC., a Nevada
Corporation,

Plaintiff,

vs.

HERBERT M. GOTTLIEB, an individual;
SWIDENT, LLC, a California Limited
Liability Company,

Defendant.

) Case No. C O7 3481 PJH
)
) DECLARATION OF MARK J. RICE IN
) RESPONSE TO TEMPORARY
) RESTRAINING ORDER (WITHOUT PRIOR
) NOTICE) TO PRESERVE EVIDENCE AND
) ORDER TO SHOW CAUSE RE
) PRELIMINARY INJUNCTION
)
) Date: August 1, 2007
) Time: 9:00 a.m.
) Crtrm: 3, 17th Floor
)

I, MARK J. RICE, declare:

1. I am attorney of record herein for Defendant Herbert M. Gottlieb and Swident, LLC. Except as otherwise noted, I state the following from personal knowledge and could and would testify competently thereto if so required.

2. On February 7, 2007, the Marin County Superior Court, the Honorable Terence Boren was scheduled to hear Petitioner, Herbert Gottlieb's motion to confirm the arbitration award against Nacio. The petition was granted.

DECLARATION OF MARK J. RICE IN RESPONSE TO TEMPORARY RESTRAINING ORDER (WITHOUT PRIOR NOTICE) TO PRESERVE EVIDENCE AND ORDER TO SHOW CAUSE RE PRELIMINARY INJUNCTION

1 3. On or about February 6, 2007, or on the day before, I received a package from
 2 Nacio's attorneys at the time enclosing a request to accept service of a "counter suit" filed by
 3 Nacio in Marin County Superior Court on February 1, 2007, claiming unfair competition by
 4 Mr. Gottlieb. I then wrote back to opposing counsel requesting a stipulation to binding
 5 arbitration, pursuant to the binding arbitration clause of the Employment Agreement, and
 6 expressing that the subject action was frivolous and malicious. A copy of that letter, dated
 7 April 11, 2007 is attached, marked Exhibit "1" and made a part hereof by this reference.
 8 Thereafter, the Donahue Gallagher Woods' firm substituted out as counsel and new counsel,
 9 Paul Steiner, dismissed the action without prejudice.

10 4. Recently, your Declarant was notified on June 25, 2007 by the Sheriff that his
 11 bank levy had identified some \$26,940.27 of Nacio funds in a bank account. A copy of said
 12 notification is attached, marked Exhibit "2" and made a part hereof by this reference. The
 13 within action by Nacio is on the heels of that bank levy. In your Declarant's view, this action is
 14 a reaction to those collection efforts. Nacio is again attempting to use these bogus claims as an
 15 "indirect appeal" to negotiate improved terms over satisfaction of the \$240,000 judgment owed
 16 to Mr. Gottlieb.

17 5. I am concerned about Nacio's finances. To date, they have not paid the
 18 judgment. Prior counsel, William Green and Ariana Seldman Hawbecker of Donahue
 19 Gallagher Woods, LLP both admitted to me that Nacio was in substantial arrears to their firm,
 20 for past due fees on assigned matters. I am personally aware that Nacio has been in the midst
 21 of a large litigation in Marin County Superior Court between two factions within Nacio, or
 22 buying and selling groups associated with Nacio assets out of the prior Nacio entity which had
 23 entered into bankruptcy (I was aware of that bankruptcy as well). I also reviewed the Marin
 24 County Recorder's Office records and noted a number of unsatisfied tax liens from the IRS,
 25 State Franchise Tax Board, and other tax entities. A copy of my typewritten notes of that
 26 search of Recorder's Office records, tax entities and amounts, the recorder's number is
 27 attached, marked Exhibit "3" and made a part hereof by this reference.

28 6. One of Nacio's claims is that they lost sales because of alleged anti-competitive
 conduct by Mr. Gottlieb. Though the claim is vague and non-specific, and denied by Mr.
 Gottlieb, it is important to reference the arbitration testimony of Murray Goldenberg to

2
 DECLARATION OF MARK J. RICE IN RESPONSE TO TEMPORARY RESTRAINING ORDER (WITHOUT PRIOR NOTICE) TO
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1 establish that it is outright false. Attached, marked Exhibit "4" hereto to my Declaration is a
 2 true and correct copy of excerpts of the transcript of proceedings of October 16, 2006 before
 3 the American Arbitration Association Arbitrator, John Kagel, and attended by Herbert Gottlieb
 4 and Murray Goldenberg, including page 12 where Mr. Goldenberg was sworn as an adverse
 5 witness and pages 73 through 79. In that portion of his testimony, Mr. Goldenberg made the
 6 following admissions:

7 (a) At page 74, lines 4 through 6, Mr. Goldenberg admitted that sales were
 8 not being generated because the GASP software was old and worn: "We were unable to
 9 generate sales to anyone's satisfaction because the software was old and worn, and it had to be
 10 refreshed."

11 (b) At page 75, lines 2 through 3, Mr. Goldenberg admitted the debt was
 12 due, stating: "I believe we owe him the money for the commissions. In given time, we will pay
 13 it."

14 (c) At page 75, lines 18 through 25, and page 76, 1 through 2, Mr.
 15 Goldenberg acknowledges that he is running the company as a consultant, though not the CEO
 16 or the President.

17 (d) At page 77, lines 1 through 11, Mr. Goldenberg again repeated that the
 18 software was not in a position to be aggressively marketed because it was "shop worn" and had
 19 to be renewed, and "so we could not do some of the things economically that Mr. Gottlieb
 20 wanted to do like a press tour, because there was no reason to do it until the new software
 21 became available."

22 (e) At page 78, lines 7 through 11, Mr. Goldenberg acknowledged that Mr.
 23 Gottlieb became a consultant to Nacio.

24 (f) At page 79, lines 1 through 5, Mr. Goldenberg stated: "Because cash
 25 flow is very critical, we could only pay the commissions when the cash was available" and
 26 admitted that the cash was not available today to pay the commissions.

27 7. In that hearing and before, Mr. Goldenberg was asserting these same unfair
 28 competitor claims. They are barred by rules of compulsory cross-complaint, as arising out of
 the same employment and consulting agreements and time frame. Further, those agreements
 call for binding arbitration of dispute before AAA.

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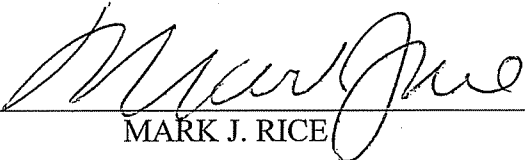
DECLARATION OF MARK J. RICE IN RESPONSE TO TEMPORARY RESTRAINING ORDER (WITHOUT PRIOR NOTICE) TO
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1 8. Obviously, if the software in October 2006 in the process of further
 2 development to be refreshed because “shop worn,” Nacio’s court claim that there was a drop of
 3 sales is simply false testimony. Mr. Goldenberg and Nacio are taking a position opposite in
 4 this case, than they took in the AAA arbitration, where they attempted to justify the stripping of
 5 Mr. Gottlieb’s staff and the nonpayment of commissions on the grounds that it did not make
 6 sense to commit resources for sales when the Attest Division of Nacio was “shop worn” and
 7 needed to be refreshed, and was being refreshed before any new aggressive markets launch.
 8 There cannot be a “loss of sales” when, in fact, Nacio has admitted through Mr. Goldenberg,
 9 the defacto control person. Nacio made a conscious business decision to not aggressively
 10 market GASP but, instead, invest in its being “refreshed.”

11 9. Exhibit 5 is a true and correct copy of the SEC cease and desist order against
 12 Mr. Goldenberg, prohibiting him from acting as a president or officer of certain company types,
 13 and citing various SEC violations. It is inferred that Mr. Goldenberg does not claim to be a
 14 Nacio officer, while *defacto* in charge, to skirt SEC scrutiny or claim.

15 I declare under penalty of perjury under the laws of the State of California that the
 16 foregoing is true and correct.

17 Executed this 25th day of July 2007, at San Rafael, California.

18 
 19 _____
 20 MARK J. RICE